THE PROGRESS OF THE LAW, 1919-1920

SALES

THE UNIFORM SALES ACT

THE Uniform Sales Act has now been enacted in Arizona, Connecticut, Idaho, Illinois, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Wisconsin, Wyoming, Alaska. There is reason to expect that the number will be increased during the present legislative season. The statute is already in force in nearly the whole of a broad strip of territory extending from Massachusetts on the east as far as Montana on the west, as well as in some states not within these limits.

THE STATUTE OF FRAUDS

There have been very few changes made by the legislatures of the several states which have enacted the Sales Act from the form recommended for enactment by the commissioners who prepared the statute. The limit of value ($500) fixed in Section 4 of the statute as making necessary a written memorandum, or partial payment or acceptance and actual receipt, has, however, been varied in several states which have passed the Act. The amount is reduced to $50 in Minnesota, New York, Oregon, Wisconsin, and Wyoming. It is reduced to $100 in Michigan; and in Iowa the statute is made applicable to all sales irrespective of the value of the goods.

A few recent decisions in regard to what are goods, wares, and merchandise within the terms of this section may be mentioned. In *Eagle Paper Box Co.* v. *Gatti-McQuade Co.*,[1] the court held, disapproving an earlier decision,[2] that a contract to sell goods to be manufactured by a third person was within the terms of the section even though the nature of the article was such that it could not

[1] 99 Misc. 508, 164 N. Y. Supp. 201 (1917).

[2] Morse *v.* Canasawacta Knitting Co., 154 App. Div. 351, 139 N. Y. Supp. 634 (1912).

readily be resold. This decision seems required by the words of the section which follow the wording of the rule originally laid down by Chief Justice Shaw,[3] and later applied in Massachusetts before the enactment of the Sales Act in a case involving, like the New York decision, a contract to sell goods manufactured by a third person.[4]

Whether an agreement to sell money as a commodity is within the Statute of Frauds has been suggested by a recent New York decision.[5] Prior to the enactment of the Sales Act, a sale of gold coin, made at a time when that form of money was at a premium, was held within the Statute of Frauds.[6] The Sales Act, following in this respect the English Sale of Goods Act, excludes money from the definition of goods.[7] The New York court, however, in the case referred to above, held a contract to sell Russian bank notes was within section 4 of the Act; and though the decision was rested mainly on the conclusion that these notes were not money, since there was no responsible government behind them, the court intimated that even domestic money if dealt with as a commodity would be within the statute; and the same inference seems warranted by a later decision in the same state,[8] where an agreement to deliver a cabled transfer for twenty thousand pounds within four months, buyer's option, to be paid for in dollars on the exercise of the option, was held either the sale of a commodity or a chose in action; and in either case within the Statute of Frauds. The conclusion seems sound; and it may fairly be held that in order to come within the exception of the statute, the article bargained for must be money, as such.

The rather regrettable doctrine that the seller may under any circumstances be the agent of the buyer to "actually receive" the goods and thereby satisfy the statute has recently been again expressed judicially.[9] The decisions which hold, as not a few do,

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[3] Mixer *v.* Howarth, 21 Pick. (Mass.) 205 (1838).

[4] Smalley *v.* Hamblin, 170 Mass. 380, 49 N. E. 626 (1898).

[5] Reisfeld *v.* Jacobs, 107 Misc. 1, 176 N. Y. Supp. 223 (1919).

[6] Peabody *v.* Speyers, 56 N. Y. 230, 234 (1874); Fowler *v.* N. Y. Gold Exchange Bank, 67 N. Y. 138, 146 (1876).

[7] Section 76.

[8] Equitable Trust Co. *v.* Keene, 111 Misc. 544, 183 N. Y. Supp. 699 (1920).

[9] Bicknell *v.* Owyhee Sheep and Land Co., 31 Idaho, 696, 176 Pac. 782 (1918). Though Idaho has enacted the Sales Act, it was not in force when the facts of this case

that the seller cannot be such an agent, as confessedly he cannot be agent to accept the goods so as to satisfy the statute, seem based on better reason.[10]

The troublesome question whether a check given for goods amounts to part payment for them within the meaning of the statute was raised in a South Dakota decision.[11] The court held that the check, being given as merely conditional payment, did not of itself satisfy the statute, and that the buyer on destroying the check and repudiating the contract was free from liability, though the check would have been paid on presentment. The correctness of such a decision depends on the meaning of conditional payment. If it means, as seems the better view, that the condition is not precedent but subsequent,[12] the statute is satisfied, where the buyer fails to present the check, provided, at least that payment would have been made on presentment; and this view not only commends itself as matter of theory, but as a practical matter, since a check accepted even in conditional payment affords more permanent and incontrovertible evidence of the sale than a payment in cash.[13] It must be admitted, however, that conditional payment is often defined in such a way as to indicate a court's understanding that the condition is precedent, and a majority of the few decisions on the subject hold, like the South Dakota decision, which is here the subject of comment, that unless a check is accepted, in absolute payment, it does not satisfy the statute until it is cashed, and that, prior to its payment, the buyer may repudiate the transaction. The question of absolute or conditional payment is one of fact, however, to be left to

arose. There seems no reason to suppose, however, that the uniform law will have any effect on this particular matter. In Stem *v.* Crawford, 133 Md. 579, 105 Atl. 780, 783 (1919) — a case decided under the Sales Act — the court took the same view as the Idaho court.

[10] See WILLISTON, CONTRACTS, § 558.

[11] Gay *v.* Sundquist, 175 N. W. (S. D.) 190 (1919).

[12] Such a conclusion is supported by decisions holding that if a check thus given is presented and paid the statute is satisfied, Hunter *v.* Wetsell, 84 N. Y. 549 (1881); Case *v.* Kramer, 34 Mont. 142, 85 Pac. 878 (1906), though by its terms in the jurisdictions where the question arose part payment was required to be contemporaneous with the bargain, in order to satisfy the statute. The courts must, therefore, have held that the part payment took place when the check was given, not when it was paid.

[13] This view seems supported by Parker *v.* Crisp, [1919] 1 K. B. 481, and McLure *v.* Sherman, 70 Fed. 190 (1895). See also Logan *v.* Carroll, 72 Mo. App. 613 (1897).

the jury, and it may be guessed that in a case of this sort the jury will generally find in favor of the seller.[14]

Subject Matter of Contract

The possibility of selling something which does not exist has involved more discussion than would seem likely from the obvious character of the answer to the question. If sale means a transfer of title, it necessarily involves the existence of some specific thing at the time when the sale is supposed to have been made.

Sale in the Roman law, however, did not bear this definition, nor does the word in the modern civil law mean this, but merely a contract to make the buyer owner in the future. A decision in Louisiana, therefore, where the code provisions are based on the civil law, should not be allowed to confuse the law of other states. It was there held [15] that a contract to sell all the Blackstrap molasses which should be made at a certain plantation in the ensuing year was a "perfect sale," vesting ownership in the buyer presumably when the molasses came into existence, for obviously title to nothing could pass at an earlier day.[16]

The metaphysical doctrine of potential possession in the common law has contributed to confusion of thought in the matter. The statement of that doctrine ordinarily involves the assumption that a sale may be made of a crop or of the young of animals, though neither the crop nor the young of the animals in question are in existence, provided that the seller owns the land or the animals from which the subject matter of the sale is to be produced.[17]

In the early days of the doctrine it was understood to involve not simply the ownership by the buyer of the goods as soon as they came into existence, but also the freedom of the buyer's title from

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[14] See Summers *v.* Wood, 131 Ark. 345, 198 S. W. 692 (1917); Rohrbach *v.* Hammill, 162 Ia. 131, 143 N. W. 872 (1913); Groomer *v.* McMillan, 143 Mo. App. 612, 128 S. W. 285 (1910); Bates *v.* Dwinell, 101 Neb. 712, 164 N. W. 722 (1917); Hessberg *v.* Welsh, 163 App. Div. 945, 147 N. Y. Supp. 44 (1914).

[15] Penick *v.* Waguespack, 86 So. (La.) 605 (1920).

[16] Illustrations of the meaning of sale in the civil law may be found in code provisions in civil law countries that a sale of something not belonging to the seller, as well as something not in existence, may be valid. See 67 Univ. of Pa. L. Rev. 76.

[17] This mode of statement, for instance, may be found in Hogue-Kellogg Co. *v.* Baker, 34 Cal. App. 56, 190 Pac. 493 (1920), though the case may be rested wholly on the settled rule that a transaction which purports to be a sale, and which cannot take effect as such, will be given effect as an executory contract.

any defects arising after the agreement though prior to the existence of the goods;[18] but modern decisions while professing to adopt the doctrine of potential possession are not likely to carry it further than to hold that on the coming into existence of the goods bargained for the buyer acquires a title good against the seller, but not necessarily against third persons.[19]

The English Sale of Goods Act and the American Uniform Law both abolish by implication the doctrine of potential possession, leaving the question of contracts to sell future crops, and the future young of animals, on the same footing as contract to sell other unspecified or future goods.

In a Colorado decision,[20] a seller contracted to sell "all hay, grade No. 2, or better, grown or growing upon the above described land for season 1916." The court held that no title passed to the hay prior to its grading and acceptance by the purchaser. Such would be the natural presumption, and if, as may be supposed, grading involved a matter of judgment and opinion, the necessary conclusion; for until the hay was graded the subject matter of the sale would not be identified. The court also held that a mortgage subsequently executed on the whole crop of hay was valid as against the buyer though the mortgagee knew of the prior contract. This also seems sound. Though an executory contract, performance of which was known by the plaintiff to involve breach by the defendant of a prior contract with a third person, may be unenforceable,[21] an actual conveyance, whether by way of sale or mortgage, must be effectual.

THE PRICE

A problem which, in view of the common use of divisible contracts, occurs often was presented in an Indiana decision;[22] namely,

[18] Thus in the leading case of Grantham *v.* Hawley, Hobart, 132, the buyer's title prevailed over the rights of an innocent purchaser of the land on which the crop in question was grown, though the purchase of the land was made prior to the existence of the crop.

[19] Thus in Hamilton *v.* Klinke, 29 Cal. App. 409, 183 Pac. 675 (1919), the buyer of a crop not yet grown was subordinated to a mortgagee who in good faith lent money on the crop after it was grown. See further, WILLISTON, SALES, §§ 133 *et seq.*

[20] Gordon *v.* Denver Alfalfa, etc. Co., 188 Pac. (Col.) 733 (1920).

[21] See WILLISTON, CONTRACTS, § 1738.

[22] Kokomo Steel & Wire Co. *v.* Macomber, etc. Co., 128 N. E. (Ind. App.) 362 (1920).

whether a seller of goods under such a contract is entitled to the price for an installment of goods which he has furnished, although he has been guilty of a subsequent breach of the contract. There seems no doubt on principle of the seller's right; that is the essence of a divisible contract.[23] The Indiana decision referred to recognizes this and allows recovery, as do most decisions involving the same point.[24]

The right of the buyer, however, to retain a payment thus due because of a breach, or threatened breach, by the seller of the remainder of the contract, has caused more difference of opinion. If the buyer has no such right, his refusal to pay will justify the seller's further non-performance, and the buyer will have no right of action because of such non-performance. If mutual debts do not cancel one another in the common law, as has been generally held,[25] this conclusion seems unavoidable, since the buyer is guilty of an unexcused material breach. So it has been held in sundry cases;[26] but a number of decisions, looking at the matter from the standpoint of business justice, have allowed the buyer thus to protect himself without losing his right to the further performance of the contract.[27] As an original question this would perhaps not be seriously objectionable, but it is evidently inconsistent with the principle that mutual debts or liabilities do not cancel one another at the option of one party, and whether that principle can be eradicated from the common law without legislation is doubtful.[28]

On a contract for the purchase of goods the buyer tendered a draft. The seller refused this and demanded payment of the price in cash. No specific provision was made in the contract for the

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[23] WILLISTON, CONTRACTS, § 861.

[24] *Ibid.*

[25] *Id.*, § 859.

[26] *Ibid.* See also Auer *v.* Roberston, 111 Atl. (Vt.) 570 (1920).

[27] WILLISTON, CONTRACTS, p. 1644, n. 30; and to the same effect see Wellington Piano Case Co. *v.* Garfield & Proctor Coal Co., 236 Mass. 544, 129 N. E. 285 (1920); Goodyear Tire & R. Co. *v.* Vulcanized P. Co., 228 N. Y. 118, 126 N. E. 711 (1920); Bernhardt Lumber Co. *v.* Metzloff, 184 N. Y. Supp. 289 (1920).

[28] The problem was presented in another form in Hunter *v.* Payne, 184 N. Y. Supp. 433 (1920). The transaction was interpreted by the court as a "cash sale" justifying the seller in replevying the goods if the condition of payment was not complied with, but it was held that as the buyer was a creditor of the seller in a larger amount than the price, in the absence of a special definite agreement expressly forbidding the buyer to apply the debt to payment of the price, he was entitled to treat the debt as equivalent to a cash payment by him.

method of payment, but the buyer, in an action brought by him for breach of the contract, offered evidence of a custom in the trade that payments should be made by draft. The seller was held not liable.[29] There is no doubt that if the parties so agree the price may be paid in any way. By the Uniform Sales Act in force in Minnesota, the price may be paid in any form of personalty. As an implied agreement is as effective as an express one, and as usage is relevant to explain the meaning of a bargain,[30] it may be urged that the Minnesota court was wrong. It should be observed, however, that a draft is not a form of money, and the contract in question expressly provided for a price in terms of money. From one standpoint, therefore, the usage may be said to have been directly contradictory to the terms of the contract. On careful analysis it seems probable, however, that what the usage amounted to was the habitual waiver by sellers in the trade in question of their right to money payment. Such a waiver, even if given expressly, being without consideration, may be withdrawn at any time so long as no irrevocable change of position has been induced thereby. This was substantially the view the Minnesota court took. The buyer should doubtless have been allowed a reasonable time to substitute cash instead of the draft, had he so desired, but more than that he could hardly ask, and as he refused to give anything but the draft, the decision seems sound.

Where there are concurrent conditions of payment of the price on one side and delivery of goods on the other, delay beyond a reasonable time on both sides totally extinguishes the contract, and notice of an intent to forfeit the obligation if the adverse party does not proceed promptly is unnecessary.[31] The contrary rule requiring notice has been enforced in some cases and may be defended as applied to contracts for the sale of land. The equitable property right acquired by the purchaser in such a case by mere force of the contract, justifies this conclusion; but the same principle is not applicable to the sale of merchandise by description.

A number of decisions have been made in the last few months involving the effect of war legislation or regulations on the per-

[29] Stein *v.* Shapiro, 176 N. W. (Minn.) 54 (1920).

[30] Sales Act, sec. 71. The Sales Act was in force in Minnesota.

[31] Pearl Mill Co., Ltd. *v.* Ivy Tannery Co., [1919] 1 K. B. 78; Hurst *v.* Hill, 96 Ore. 311, 188 Pac. 973 (1920). WILLISTON, CONTRACTS, § 1970.

formance of contracts. These cases involve rather a general problem of the law of contracts than any special principle of sales. They should be decided in the same way, whether the contract in question relates to the sale of goods or to anything else. A somewhat special problem of construction was presented, however, in *Ross Lumber Co.* v. *Hughes Lumber Co.*[32] The contract there in question provided for the sale in installments of large quantities of lumber at prices which it was agreed should be fixed, from time to time, with reference to the then market price. While the contract was still executory, the government fixed a maximum price. It was held, correctly as it seems, that the price so fixed by the government was not a market price within the meaning of the contract.

Transfer of Property Between Buyer and Seller

It is a recognized principle that where a contract is made to sell goods by description, the seller with the assent of the buyer may appropriate specific goods to the buyer and thereby transfer the ownership to him.[33] The assent of the buyer to the appropriation may be given either before or after the appropriation is made. In a recent English case[34] the seller, without previous authority so to do, appropriated certain goods to the buyer, which were of the kind and quality that contract between them required, and notified the buyer of the fact. No reply to this notification was made by the latter. The court held, and it seems rightly, that unless the buyer under such circumstances sends a prompt notice objecting to the appropriation, he must be deemed to assent thereto. The case is interesting not simply for the specific point decided in the law of sales, but with reference to the general question of when silence may be regarded as assent.[35]

A curious question of transfer of ownership by mistake was presented in *Jones* v. *Chicago, B. & Q. R. Co.*[36] A consignor in that case, erroneously supposing that he was bound to do so, shipped goods to the plaintiff, drawing a draft on him for the price and

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[32] 264 Fed. (C. C. A., 5th) 757 (1920).

[33] Sales Act, sec. 19, Rule 4. Williston, Sales, § 274 *et seq.*

[34] Pignataro *v.* Gilroy, [1919] 1 K. B. 459.

[35] See Williston, Contracts, § 91.

[36] 102 Neb. 853, 170 N. W. 170 (1918).

sending it forward with a bill of exchange. The consignor had in fact agreed to sell goods of the sort to a third person and acted under the impression that the contract was with the plaintiff. The plaintiff in good faith supposed the goods were meant for him, and on this assumption paid the draft and obtained the bill of lading; but before the goods were delivered the consignor discovered his mistake, and by his direction the railroad refused delivery. The plaintiff sued the railroad company but was denied recovery. The case seems wrong. The seller's apparent intent might justly be relied on by the plaintiff if he acted in good faith. There was, therefore, a clear offer of the goods which the plaintiff accepted by paying the draft. The acquisition of the bill of lading gave him constructive possession of the goods, and the refusal of the railroad to honor its bill of lading made it guilty of a conversion of the goods to which the bill related.

In two recent decisions [37] courts have repeated what has been said many times before,[38] though it is impossible to accept it as accurate, that where a check is given for property and the check is not paid on presentation, the title to the property never passes to the buyer. The argument in support of this conclusion is that the sale was intended to be a cash sale, and that title therefore does not pass until cash has been received. The argument is fallacious, however; the seller in fact intends to exchange the ownership of the goods for the check which he receives. He is induced to do so by the belief that the check is good. If the buyer has no funds he is committing a fraud, but this will result only in title being voidable, not in an entire failure of title to pass. If it were true, as is often stated, that no title passes until the check is paid, the buyer is a tort feasor if he uses the goods until the check is paid, even though there are ample funds in the bank to make the payment. If it were true, as it is also often stated, that the fact that the check is given merely in conditional payment proves that no title passes until the condition is satisfied, the same consequence would follow

[37] South San Francisco Packing Co. *v.* Jacobsen, 59 Cal. Dec. 634, 190 Pac. 628 (1920); Thomas *v.* Farmers' Nat. Bank, 217 S. W. (Mo. App.) 860 (1920).

[38] WILLISTON, SALES, § 346, n. 28; and to the cases there cited may be added, Sims *v.* Bolton, 138 Ga. 73, 74 S. E. 770 (1912); Dosbaugh Nat. Bank *v.* Jelf, 86 Kan. 41, 119 Pac. 538 (1911); Peoples' State Bank *v.* Brown, 80 Kan. 520, 103 Pac. 102 (1909); Johnson *v.* Iankovetz, 57 Ore. 24, 110 Pac. 398 (1910).

if a time draft were given instead of a check. Such a result would obviously be absurd.[39] The decision in most of the cases here criticised for asserting that title did not pass to the buyer was indeed correct, because the controversy was either between the original parties or at least did not involve an innocent purchaser, and the buyer's conduct justified the conclusion that he was fraudulent;[40] but the reasoning of the courts would warrant the inference that the seller might reclaim the goods from an innocent purchaser; for one who fraudulently acquires merely possession, without even a voidable title, cannot transfer any right even to an innocent purchaser.

The point not accepted by the modern law of England until enacted by statute in 1889, that a second buyer obtaining delivery of the goods without notice of an earlier sale by the seller to another can retain the goods against the prior purchaser though as between the latter and the seller the title had passed, has been again decided.[41]

Transfer of Title and Risk of Loss under Bills of Lading

The lack of any complete understanding of mercantile usage regarding the use of bills of lading, or perhaps it should rather be said the inability to translate an understanding of the facts into proper legal terms, still persists, and in England it is likely to persist, for there no corrective legislation exists. In the United States the provisions of the Sales Act regarding documents of title, the provisions of the Uniform State Law governing bills of lading and of the similar federal statute (the Pomerene Act) governing interstate bills, and also of the Uniform Warehouse Receipts Act, are likely ultimately to put the matter on a proper basis.

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[39] In White *v.* Garden, 10 C. B. 919 (1851), and Whitehorn *v.* Davison, [1911] 1 K. B. 463, time bills were given under circumstances making it evident that there was no expectation on the part of the buyer that the drafts would be paid. His conduct was therefore fraudulent; yet he was held to acquire a title enabling him to give an indefeasible right to a bona-fide purchaser.

[40] This has not always been true, however, and in the two recent cases cited *supra*, n. 37, the evidence of the buyer's fraud was by no means clear. In both cases if the check had been presented more promptly, apparently it would have been paid.

[41] Williams *v.* Lancaster, 111 Atl. (Me.) 754 (1920). See further Sales Act, sec. 25, and Williston, Sales, § 349 *et seq.*

The root of the difficulty is the failure to grasp the idea that more than one person can have a property right in the same goods.

When a seller ships goods on the order of a buyer, or with a view to perform a prior contract with a buyer, and takes the bill of lading to his own order, his purpose in so doing is merely to secure payment of the price. The situation is in legal effect the same as if he had absolutely transferred title to the buyer and the buyer had mortgaged back that title to the seller to secure payment of the price. It has seemed hard for the courts to understand that both seller and buyer have incidents of ownership. It is too often apparently taken for granted that one party or the other must have title, and that the other can have only a contract right; yet the illustrations in the law of divided incidents of ownership are so numerous that there seems little excuse for misunderstanding. Equity has built up a whole system of jurisprudence based on the idea of one party having the legal title and the other the beneficial incidents of ownership; and it should not be supposed that the essential features of such a relation are peculiar to equity. A mortgage or a security title is not different in its nature when it relates to personal property and when it relates to land. Nor should it make any difference in the essential rights of the parties in what form the security title is held, whether by way of a purchase money mortgage, or a conditional sale, or a bill of lading running to the seller's order. It may indeed make a difference where statutes affect the situation. A recording act in terms applicable to mortgages does not apply to conditional sales, and recording acts applicable to either or both of such transactions will not usually be broad enough in terms to include a security title given or retained by means of a bill of lading, but sometimes they may be.[42] To some degree the theory here expressed has been carried out in the decisions of the courts dealing with bills of lading, but very partially and not always consistently in different kinds of cases. A full recognition of the principles involved carries with it two important consequences:

1. The seller has the legal title so that he can convey the property even in violation of his duty to the buyer. This has generally

[42] See *infra*, p. 759.

been recognized, the seller's power being given the vague name of *jus disponendi*.[43]

2. The buyer bears the risk and has the beneficial incidents of property; and as against any one but an innocent purchaser for value of the bill of lading from the seller, may maintain trover, or analogous action based on ownership, on making tender of the price.[44]

The problem has been presented recently in three classes of cases, which may be considered separately, namely:

A. The uncomplicated case supposed above of shipment from seller to buyer where there is no prior c. i. f. contract.

The goods are shipped to the prospective buyer and the seller takes a bill of lading for them in his own name, and nothing appears on the bill of lading to indicate the buyer's name, unless it be a request to the carrier to notify a certain person, who in fact is the buyer. The Sales Act provides that in such a case the property in the goods is retained by the seller; but that if, except for the form of the bill of lading, the property would have passed to the buyer on shipment, the seller's ownership shall be deemed to be merely for the purpose of securing performance of the buyer's obligations; [45] and the risk of loss in transit in such a case is thrown upon the buyer.[46] But where the Sales Act is not in force, courts too often do not look beyond the mere fact that the seller has retained title and hold that the risk of loss during transit is upon him.[47] On the other hand, a court sometimes recognizes that the substantial benefit of the transaction has already passed to the buyer, and is thus led to assert that the buyer already has the legal title, and that the seller's interest is merely a lien.[48]

[43] WILLISTON, SALES, § 283. Collin County Nat. Bank *v.* Harris, 90 Ark. 439, 119 S. W. 662 (1909).

[44] WILLISTON, SALES, § 284. J. L. Price Brokerage Co. *v.* Chicago, etc. R. Co., 199 S. W. (Mo. App.) 732 (1917). See also W. T. Wilson Grain Co. *v.* Central Bank, 139 S. W. (Tex. Civ. App.) 996, 999 (1911).

[45] Sales Act, sec. 20 (2).

[46] Section 22 *a*. In Alderman Bros. Co. *v.* Westinghouse Air Brake Co., 92 Conn. 419, 103 Atl. 267 (1918), and Kinney *v.* Horwitz, 93 Conn. 211, 105 Atl. 438 (1919), the court accordingly held the buyer liable for the price of goods destroyed in transit, though the bills of lading ran to the seller's order.

[47] Henderson *v.* Lauer, 28 Cal. App. 909, 181 Pac. 811 (1919); Willman Mercantile Co. *v.* Fussy, 15 Mont. 511, 39 Pac. 738 (1895); Penniman *v.* Winder, 103 S. E. (N. C.) 908 (1920); St. Louis & San Francisco Ry. *v.* Allen, 31 Okla. 248, 120 Pac. 1090 (1912); Graham *v.* Laird Co., 20 Ont. L. Rep. 11 (1909).

[48] Robinson *v.* Houston, etc. Ry. Co., 105 Tex. 185, 146 S. W. 537 (1912).

B. The mercantile doctrine in regard to bills of lading has been most fully recognized in what are called c. i. f. contracts; that is, contracts where a total price is fixed covering the cost of the goods, their freight to the port of destination, and the cost of insuring them while in transit. Contracts of this sort are understood to involve as a primary feature an obligation on the part of the buyer to pay the price on presentation of documents, — that is, ordinarily the invoice of the goods, the bill of lading representing them, a receipt for the freight and an insurance policy.[49] Sometimes a warehouse receipt at the port of destination is substituted for the bill of lading. The insurance policy, as originally taken out, ordinarily either runs to the seller or is in such broad terms as to cover the interest of any one who may be owner of the goods while they are in transit.

In this class of cases it is well established that the buyer may have a property interest in the goods from the time of shipment. A mysterious force is indeed often given to the letters c. i. f. which seems hardly warranted. It is possible to import into contracts which provide for payment in a lump sum of cost, insurance and freight, terms which differ very widely, but the assumption has generally been made that under a c. i. f. contract a property interest in the goods necessarily passes to the buyer on shipment, and that the title retained by means of the shipping documents is retained merely for security.

"The familiar c. i. f. contract . . . has 'its recognized legal incidents, one of which is that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight.'" [50]

[49] Ireland *v.* Livingston, L. R. 5 H. L. 395, 406 (1871), per Lord Blackburn, and see cases of c. i. f. contracts cited in the following notes.

[50] Thames & Mersey Ins. Co. *v.* United States, 237 U. S. 19, 26 (1915), quoting from Ströms Bruks Aktie Bolag *v.* Hutchison, [1905] A. C. 515, 528.

In Biddell *v.* E. Clemens Horst Co., [1911] 1 K. B. 934, 955, 956, Kennedy, J. (whose opinion was strongly approved on appeal to the House of Lords, E. Clemens Horst Co. *v.* Biddell, [1912] A. C. 18), said: "At the port of shipment — in this case San Francisco — the vendor ships the goods intended for the purchaser under the contract. Under the Sale of Goods Act, 1893, s. 18, by such shipment the goods are appropriated by the vendor to the fulfilment of the contract, and by virtue of s. 32 the delivery of the goods to the carrier — whether named by the purchaser or not — for the purpose of transmission to the purchaser is prima facie to be deemed to be a delivery of the goods to the purchaser. Two further legal results arise out of the shipment. The

It is accordingly said: "No one doubts that the seller's breach of a c. i. f. contract arises on failure to ship, but no one suggests that the buyer's duty to pay arises on such shipment." [51] It follows also that the risk of loss is on the buyer, and a tender of proper documents must be accepted, though the goods have previously been lost or have deteriorated.[52]

This has been held true where the Sales Act is in force, though that Act implies in rule 5 of section 19 that payment of the freight by the seller affords a presumption that the property in the goods was not intended to pass until they reached their destination.[53] The presumptions named in section 19 are by the terms of that section applicable only "unless a different intention appears;" and the well understood character of a c. i. f. contract is held to indicate a different intention.

On principle it may be thought that any universal assumption that a c. i. f. contract must involve all the consequences just stated is unsound. Frequently such contracts expressly provide that payment shall be based on "net landing weights," or that "sound packages" only shall be accepted. Such provisions are inconsistent with the idea that the risk of loss is on the buyer.

On the whole question of transfer of a property interest on

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goods are at the risk of the purchaser, against which he has protected himself by the stipulation in his c. i. f. contract that the vendor shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer's interest, and available for his use, if the goods should be lost in transit; and the property in the goods has passed to the purchaser, either conditionally or unconditionally. It passes conditionally where the bill of lading for the goods, for the purpose of better securing payment of the price, is made out in favour of the vendor or his agent or representative: see the judgments of Bramwell, L. J. and Cotton, L. J. in *Mirabita* v. *Imperial Ottoman Bank* (1878), 3 Ex. D. 164. It passes unconditionally where the bill of lading is made out in favour of the purchaser or his agent or representative, as consignee."

[51] Parker *v.* Schuller, 17 T. L. R. 299 (1901); Crozier, Stephens & Co. *v.* Auerbach, [1908] 2 K. B. 161; Farwell, J., in Biddell *v.* E. Clemens Horst Co., [1911] 1 K. B. 934, 951.

[52] Manbre Saccharine Co. *v.* Corn Products Co., [1919] 1 K. B. 198; Biddell Bros. *v.* E. Clemens Horst Co., [1911] 1 K. B. 934, 959, per Kennedy, L. J., whose opinion was approved by the House of Lords on appeal, [1912] A. C. 18; Mee *v.* McNider, 109 N. Y. 500, 17 N. E. 424 (1888); Smith *v.* Moscahlades, 193 App. Div. 126, 183 N. Y. Supp. 500 (1920); Martin *v.* Sclafani, 159 N. Y. Supp. 41 (1916); Smith Co. *v.* Marano, 267 Pa. 107, 110 Atl. 94 (1920); Bowden *v.* Little, 4 Comm. (Australia) 1364 (1907); Delaurier *v.* Wyllie, 17 Ct. Sess. Cas. (4th Series) 167 (1889).

[53] Smith *v.* Moscahlades, 193 App. Div. 126, 183 N. Y. Supp. 500 (1920); Smith Co. *v.* Marano, 267 Pa. 107, 110 Atl. 94 (1920).

shipment of the goods, the decisions on c. i. f. contracts afford an interesting comparison with cases previously cited where by contract or custom the price of goods is payable against bills of lading, but no c. i. f. clause is inserted. As has been seen, apart from statute, the weight of American authority in those cases seems to hold that title and risk are in the seller until the buyer acquires the bill of lading. Yet every reason for holding that risk passes to the buyer on shipment under a c. i. f. contract is equally applicable to contracts which have no such clause. The provision that the seller pay the freight, indeed, permits a possible argument that no property interest passes in the c. i. f. cases which does not exist in the other cases, namely, that the seller being under a duty to pay for transportation may be supposed to be under a duty to deliver the goods at destination and to retain the ownership until that duty is fulfilled. As has been said, though the Sales Act following the common law raises a presumption that payment of the freight involves retention of ownership, the presumption has been held inapplicable to c. i. f. contracts. This seems sound, but surely the provision requiring the seller to pay the freight in the first instance cannot be a stronger indication of intent to pass the title than the contrasted case where the seller does not pay the freight, but where the buyer is compelled to pay it in order to get possession of the goods.

The provision for insurance in a c. i. f. contract might afford definite indication of an intent to give the buyer a property interest as soon as the goods were shipped if the insurance policy were ordinarily taken out in the first place in the name of the buyer, but in fact the policy is not ordinarily so taken out. Therefore no inference seems permissible from that feature of the contract.

C. The unfortunate failure of the courts to translate the mercantile customs in regard to bills of lading into rules of law, which has been confirmed in England probably beyond hope of change by the grounds of decision stated by the House of Lords in *Sewell* v. *Burdick*,[54] finds illustration in recent prize cases. In the case just cited the court held that the indorsee of a bill of lading for security was not the person "to whom the property in the goods passes," within the meaning of a statute rendering such a person liable for

[54] 10 App. Cas. 74 (1884).

freight. The court held that the indorsee of the bill of lading was a pledgee with a special property. Doubtless it would have been unfortunate to hold an indorsee of the bill of lading for security liable for freight. He is not the kind of owner whom the statute sought to reach. The result could have been attained by holding, as Lord Blackburn suggested, that the security holder was a mortgagee, but that transfer by way of mortgage was not a transfer of "the" property within the meaning of the statute.

Accepting the reasoning of this decision as conclusive, the English courts in several cases involving questions of prize law have held the holder of a bill of lading for security not an owner.

In *The Miramichi*,[55] it was held that a cargo shipped under a c. i. f. contract by a neutral to a German buyer, on a British vessel, before the imminence of war, was not subject to seizure — the property in the goods, it was said, had not passed to the enemy; the documents not having been taken up by him, and money having been advanced on them by a neutral banker. Sir Samuel Evans said that under previous decisions it was settled

"that, in the circumstances of the present case, the goods had not at the time of seizure passed to the buyers; but that the sellers had reserved a right of disposal or a *jus disponendi* over them, and that the goods still remained their property, and would so remain until the shipping documents had been tendered to and taken over by the buyers, and the bill of exchange for the price had been paid."

But in *The Odessa*,[56] where a cargo was shipped prior to the imminence of war, and the appellants who were neutrals had accepted bills of exchange, and as security received a bill of lading which made the cargo deliverable directly to them or assigns, the court held that the general property was in a German buyer, and that the appellants were merely pledgees thereof; and that the prize court did not recognize the claim of the pledgee but that the matter was governed by legal ownership. Lord Mersey rather naïvely said,[57] "All the world knows what ownership is, and that it is not lost by the creation of a security upon the thing owned." The cases are indistinguishable. In both of them the legal title to the

[55] [1915] Probate, 71, 78.
[56] [1916] 1 A. C. 145.
[57] *Ibid.*, 154.

goods — a title held merely for security, however, — was in neutral hands, and the interest of the German buyers, though a property right like an equity of redemption, was burdened with an obligation amounting to the full price of the goods. The most recent decision of the Privy Council,[58] however, most fully exemplifies the lack of proper analysis of the relations of the parties in bill of lading transactions. A Texas seller had contracted to sell a Hamburg firm a quantity of wheat, "payment in Hamburg by net cash in exchange for shipping documents." There was no anticipation of war at the time. The wheat was shipped on the British steamship *Orteric*, under bills of lading making the wheat deliverable to shipper's order. The shipper indorsed the bills of lading in blank and drew a draft on the Hamburg buyer for the contract price. Attaching the bills of lading to the draft, he sold it through brokers to the National City Bank of New York, indorsing it specially to that bank. The brokers' contract described the transaction as a sale. The National City Bank indorsed the draft to a Hamburg bank for collection, the documents attached to it to be delivered to the drawees against payment. The bill of exchange was not accepted or paid, doubtless because the drawees expected that the war which had then broken out would prevent the cargo from reaching Germany — as indeed proved the case. The mercantile analysis of the situation thus presented is simple. The wheat was shipped under a contract with the German buyer and was at his risk from the time of shipment. The seller's retention of title by taking the bill of lading to his own order, was merely for the purpose of securing the payment of the price. He was in exactly the legal situation of a conditional seller who on delivering goods to the buyer retains the title as security.

When the Texas shipper sold the bill of exchange in New York, with the bill of lading as security, he assigned his claim for the price of the goods to the New York bank and with this he assigned his security title to the goods. He himself then dropped out of the transaction. In his own words, as he testified: "In the usual course of events when you part with those documents, you have said 'good bye' to the transaction." On these facts the Privy Council, after disallowing the claim of the National City Bank,

[58] The Orteric, [1920] A. C. 724.

held that the property in the goods at the time of their seizure while in transit was in the Texas seller. The one person of the three parties interested who had dropped out of the transaction was thus held to be the owner. It is true that as drawer of the bill of exchange he would ultimately have to reimburse the City Bank, and would then receive back the cargo if not held by the British government; but so far as the cargo was concerned, this would be merely a rescission of a previous transfer, and had the Texas shipper drawn his bill of exchange without recourse, such a rescission would not have taken place. The City Bank would probably not have cared to buy the bill of exchange, had it been drawn without recourse, but that method of drawing the draft could hardly have affected the ownership of the goods.

The subject of trust receipts given by the ultimate buyers of goods to bankers holding a bill of lading as security, has been considered in a few cases. It should make no difference in the substantial rights of the parties whether the transaction takes the form of a direct shipment from the seller to the banker at the buyer's home, with whom the buyer has arranged the credit, or whether after shipment to the seller's order an indorsed bill of lading is sent forward with a draft on the buyer's banker, who by paying the draft acquires the security of the bill of lading. In either form of transaction the banker has title, and in either form the title is merely for security. Whether the banker may properly entrust the bill of lading to the ultimate buyer, giving the latter a right to get the goods from the carrier and to deal with them as the exigencies of his business may require, while the banker still retains his security title, is a question of policy to which the same considerations are applicable as where a conditional seller entrusts the buyer with possession and a right to use goods as his own, or where a chattel mortgagee similarly entrusts the mortgagor. The case may be technically distinguished from an entrusting by a lien holder or by a pledgee to the general owner, since their legal right to security is theoretically dependent on possession rather than title. Where the security holder has title there is involved merely the question of the propriety of allowing him to assert that title against creditors of or buyers from one to whom he has entrusted the property and to whom he has given the privilege of dealing with it in ways ordinarily appropriate only for an owner.

In the case of chattel mortgages, and to a less degree in that of conditional sales, it has been found desirable to require record by the holder of the security title as a pre-requisite to the assertion of his title against innocent third persons. The statutes making this requisite have not generally been held broad enough in their terms to affect the right of bankers who accept trust receipts for bills of lading held by them as security. In a recent bankruptcy case, however,[59] the Ohio statute requiring record of conditional sales and similar bargains was held broad enough in its terms to deprive the banker of a right to reclaim from the buyer's trustee in bankruptcy goods which the latter held under a trust receipt at the time of the bankruptcy.

In a Massachusetts case, on the other hand, the banker was protected against the representatives of an insolvent buyer's estate.[60] In that case, presumably in order to show that the local chattel mortgage act was inapplicable, the court said:

"The plaintiff purchased the hides in its own name and interest for the ultimate use of the firm, directly from the foreign seller, and paid for them. It therefore had the legal title to the hides and rightly dealt with them as owner in its relations with the firm, and was not a mortgagee or pledgee."

The language may be justifiable to indicate that the case was not within the statute, but there is danger of its being misunderstood to imply:

1. That the transaction in its substantial nature is distinguishable from a transfer by way of security of a bill of lading originally running to the order of the seller or of the buyer.

2. That there is not just as much propriety from the standpoint of both logic and public policy in requiring record where the bill of lading is in one form or the other.

In substance the transaction is a mortgage,[61] and the only excuse

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[59] *In re* Bettman-Johnson Co., 250 Fed. 657 (1918).

[60] Peoples Nat. Bank *v.* Mulholland, 228 Mass. 152, 155, 117 N. E. 46 (1917).

[61] In Moors *v.* Kidder, 106 N. Y. 32, 44, 12 N. E. 818 (1887), where the bill of lading ran directly to the banker, the court said rightly: "Very likely, as is suggested for the defendant, the transfer was rather in the nature of a mortgage in which the title passes than in than of a pledge in which the pledgor is general owner." And *In re* Richheimer, 221 Fed. 16, 22 (1915), the court said of a similar transaction: "This 'security title' of the bankers cannot have the force of an unqualified ownership of the

for not requiring record can be that, on a balance of conveniences, it is more important to have a form of business necessary for commerce proceed unhampered than it is to protect such persons as may be deceived by the apparent ownership of those to whom bankers have entrusted goods upon which they hold security. This excuse is no better and no worse when the bill of lading runs directly to the banker's order than when it is merely endorsed to him.

WARRANTIES

A number of cases have arisen in the law of warranty but most of them have no special interest. A few, however, may be mentioned.

On a sale of glue the buyer saw the barrels containing the glue and every facility was offered him for further inspection, but being pressed for time he did not open any of the barrels. It was held that "he had examined the goods" within section 14 (subsection 2) of the Sale of Goods Act.[62] As the American Sales Act follows the wording of the English Statute, the case has greater interest.[63] The decision follows the common law, for an opportunity for inspection undoubtedly has the same effect as actual inspection;[64] but the failure of the statutory codification so to provide in express terms gives some importance to the decision.

Where the buyer specifies exactly what he desires, there is no warranty implied of fitness for a particular purchase. Thus, where the buyer specified the ingredients of brass to be manufactured, no warranty of the degree of hardness could be implied.[65] Similarly when fertilizer was sold under a guaranteed analysis there was no implied warranty that it was suitable for a particular crop though the seller knew the buyer intended it to fertilize land

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goods, with complete right of disposition irrespective of the importer's interest. The exporters having 'relinquished the whole of their interest' on transmission of the bills of lading to the bankers, the title acquired by the bankers for security must leave a 'residue of ownership' of some character in the importer under the contract of purchase and consignment of the goods."

[62] Thornett *v.* Beers, [1919] 1 K. B. 486.

[63] See Sales Act, sec. 15 (3).

[64] WILLISTON, SALES, § 234. See also Neal *v.* West Winfree Tobacco Co., 219 S. W. (Ark.) 326 (1920).

[65] Century Electric Co. *v.* Detroit Copper, etc. Co., 264 Fed. 49 (1920).

for such a crop.[66] A contract to sell goods like a sample means goods such as the sample appears to be. One aspect of this principle was brought out in the leading case of *Heilbutt* v. *Hickson*,[67] where a sample shoe contained, unknown to the buyer, paper in the sole. The seller was there held bound to furnish shoes which had no paper in the sole. A converse situation is brought out in a recent California case.[68] The buyer ordered bottles, and a sample bottle was sent by the buyer which was said to show the exact finish wanted. Bottles were furnished by the seller which corresponded in shape and finish with the sample bottle, but a method of sterilization used by the buyer, and said to be indispensable in its business of selling certified milk, spotted the bottles which the seller furnished, though it did not injure the sample bottle. It was held that the seller having no knowledge of this method of sterilization was not liable for breach of contract or warranty.

In accordance with the generally prevailing rule in the United States, where the Sales Act has not been enacted, a dealer is not liable for defects of which he has no knowledge. Therefore, an automobile dealer was held not liable for latent defects in a machine which he sold.[69]

It is to be observed that under the Sales Act, following the English Statute, which in turn copied the English common law, a dealer is subjected to a larger liability.[70]

Many cases have arisen recently in regard to the liability of a manufacturer of food products to an ultimate purchaser from a retail dealer due to the improper character of the food. The general rule in regard to all warranties is that they do not run in favor of any but an immediate purchaser,[71] and this principle has been held applicable generally to sales of food to a subpurchaser.[72] Several recent cases, however, have imposed the absolute liability

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[66] Bowker Fertilizer Co. *v.* Wallingford, 111 Atl. (Me.) 329 (1920).

[67] L. R. 7 C. P. 438 (1872).

[68] Travis Glass Co. *v.* Robbins, 31 Cal. App. 551, 189 Pac. 112 (1920).

[69] Hoyt *v.* Hainsworth Motor Co., 192 Pac. (Wash.) 918 (1920).

[70] See Sales Act, sec. 15.

[71] WILLISTON, SALES, § 244.

[72] Nelson *v.* Armour Packing Co., 76 Ark. 352, 90 S. W. 288 (1905); Drury *v.* Armour, 140 Ark. 371, 216 S. W. 40 (1919); Prater *v.* Campbell, 110 Ky. 23, 60 S. W. 918 (1901); Roberts *v.* Anheuser Busch Assn., 211 Mass. 449, 98 N. E. 95 (1912); Tomlinson *v.* Armour Packing Co., 75 N. J. L. 748, 70 Atl. 314 (1907); Crigger *v.* Coca-Cola Bottling Works, 132 Tenn. 545 (1915).

of a warrantor on such a manufacturer in favor of the ultimate purchaser.[73]

There of course is no doubt that the manufacturer is liable to the ultimate purchaser for the consequences of negligence if negligence can be established,[74] but to go further seems somewhat severe. There is difficulty in distinguishing subsales of food from subsales of such other articles of merchandise at least as are likely to produce physical injury if improperly manufactured. The difficulty in theory, however, which most courts seem to feel, that the liability of a warrantor is contractual, and, therefore, can only run directly between a purchaser and his immediate seller, does not seem impressive. A warranty is in many cases imposed by law not in accordance with the intention of the parties; and in its origin is enforced in an action sounding in tort, and based on the plaintiff's reliance on deceitful appearances or representations rather than on a promise.

Performance of a Contract to Sell

The Sales Act provides, —

"Where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault." [75]

It has rightly been held that this provision has reference only to a temporary fault, while the contract between the parties is still subsisting.[76] It cannot be supposed that the seller may continue permanently to hold the goods at the risk of the buyer when the latter is in default. Two recent cases, one of which arose under the

[73] Dothan Chero-Cola Bottling Co. *v.* Weeks, 16 Ala. App. 639, 80 So. 734 (1918); Davis *v.* Van Camp Packing Co., 176 N. W. (Ia.) 382 (1920); Parks *v.* Yost Pie Co., 93 Kan. 334, 144 Pac. 202 (1914); Chysky *v.* Drake Bros. Co., 192 App. Div. 186, 182 N. Y. Supp. 459 (1920); Ward *v.* Morehead City Seafood Co., 171 N. C. 33, 87 S. E. 958 (1916); Catani *v.* Swift & Co., 251 Pa. 52, 95 Atl. 52 (1915); Mazetti *v.* Armour & Co., 75 Wash. 622, 135 Pac. 633 (1913); Flessher *v.* Carstens Packing Co., 93 Wash. 48, 160 Pac. 14 (1916). See also dissenting opinion in Drury *v.* Armour & Co., 140 Ark. 371, 216 S. W. 40 (1919). It is sometimes not easy to be sure whether a court holds that the manufacturer is liable without negligence or that the defect proved to exist in the manufactured product is without more sufficient evidence of negligence.

[74] See cases collected in 18 MICH. L. REV. 436.

[75] Sales Act, sec. 22 (b).

[76] Rylance *v.* The James Walker Co., 129 Md. 475, 99 Atl. 597 (1916).

Sales Act and the other at common law, presented a situation of such temporary fault where the buyer was held liable for loss.[77]

No occasion should be lost to emphasize the distinction between the several uses of the word acceptance in the law of sales. It is variously used in three connections:

1. As indicating a method of satisfying the Statute of Frauds;
2. As indicating assent by the buyer to take title to the goods;
3. As indicating not only such assent, but an assent by the buyer to take the seller's performance as full satisfaction.

The requirements of acceptance under the Statute of Frauds will not here be discussed, but two recent cases illustrate the principle that a buyer who makes use of property offered to him under a contract to sell, thereby assents to transfer of ownership.[78] This is true, even though the buyer asserts while using the goods that he does not accept them.[79] The cases present an illustration of the principle that where a certain act is rightful only upon one assumption, the actor is not allowed to assert that he acted on any other assumption. In other words, he cannot set up that his act was wrongful.[80]

The much vexed question whether acceptance by the buyer of goods which are inferior to the requirements of a contract between the parties frees the seller from liability is settled by the provisions of the Sales Act in the negative, though the buyer will lose his rights if he fails to give notice within a reasonable time after he "knows or ought to know" of the breach of any promise or war-

[77] In Schenning *v.* Devere, etc. Lumber Co., 180 N. W. (Wis.) 136 (1920), lumber was sold for delivery f. o. b. at a certain siding, and the seller had written the buyer, urging immediate orders for shipment because of the danger from fire while the lumber remained piled in the yards near the railroad track. To this the buyer replied, promising to send shipping instructions in a day or two. The trial court found that a delay of ten days in sending the shipping instructions was unreasonable under the circumstances, and the buyer was held liable for the loss, though the title remained in the seller, under the Sales Act (St. 1919, § 1684t-22, subd. 2). In Bishop *v.* Descalzi, 31 Cal. App. 543, 189 Pac. 122 (1920), a buyer who wrongfully refused to receive the oranges he contracted to purchase was held liable for the price of oranges destroyed thereafter by frost before the owner could resell them, regardless of whether the title to the oranges had passed or not.

[78] Vapor Vacuum Heating Co. *v.* Kaltenbach & Stephens, Inc., 111 Atl. (N. J.) 171 (1920).

[79] Robertson & Wilson Co. *v.* Richman, 180 N. W. (Mich.) 470 (1920).

[80] WILLISTON, CONTRACTS, §§ 21, n., 1795, 1856.

ranty.[81] The buyer's right to damages after acceptance of the goods was enforced under this provision in a recent Connecticut decision.[82] Several cases in New York have also construed the section of the act and recognized that the previous rule in New York, which with certain rather technical exceptions denied the buyer relief, has been abolished.[83]

Whether the requirement of notice imposed by the Sales Act has been reasonably complied with involves a question of fact; [84] and the requirement is not confined to alleged breach of warranty or promise of quality, but is applicable to breach of any promise of the seller, for instance to deliver at a certain time.[85] It may be objected, what is the use of notifying a seller who has contracted to deliver goods on June 1 and who delivers them on June 2 that he has broken his contract by a late delivery? The seller must know that without being notified. But the words of the statute cover breach of "any promise or warranty"; and the purpose of the requirement is to inform the seller not merely that he has failed in the exact performance of his obligation, but also that the buyer does not accept the defective performance (as he might) in full satisfaction.

It has been decided in a number of cases that where one who is under several contracts to sell goods finds it impossible for some cause which operates as a legal excuse to fulfill all the contracts, he may apportion to the several buyers ratably the amount still possible for him to furnish, without liability for the deficiency.[86] A recent Missouri decision [87] turned on a term of a contract to sell coal, providing that the seller might make other contracts for the

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[81] See Sales Act, sec. 49.

[82] Williams *v.* Perrotta, 111 Atl. (Conn.) 843 (1920). See also Bishop *v.* Descalzi, 31 Cal. App. 542, 189 Pac. 122 (1920); Trimount Lumber Co. *v.* Murdough, 229 Mass. 254, 118 N. E. 280 (1918).

[83] Regina Co. *v.* Gately Furniture Co., 171 App. Div. 817, 157 N. Y. Supp. 746 (1916); Mastin *v.* Boland, 178 App. Div. 421, 165 N. Y. Supp. 468 (1917); Kutsukian *v.* Limpert, 167 N. Y. Supp. 1036 (1918); Mechlowitz *v.* Krenik, 170 N. Y. Supp. 923 (1918); Majestic Cola Co. *v.* Bush, 171 N. Y. Supp. 662 (1918).

[84] M. & M. Co. *v.* Hood Rubber Co., 226 Mass. 181, 115 N. E. 234 (1917); Stone *v.* Beim, 176 N. Y. Supp. 25 (1919).

[85] Trimount Lumber Co. *v.* Murdough, 229 Mass. 254, 118 N. E. 280 (1918); Mason *v.* Valentine Souvenir Co., 180 App. Div. 823, 168 N. Y. Supp. 159 (1917).

[86] WILLISTON, CONTRACTS, § 1962.

[87] White Oak Coal Co. *v.* Squier Co., 219 S. W. (Mo. App.) 693 (1920).

sale of coal, and that if the total obligations thus created should exceed the seller's total shipments it might apportion the goods pro rata among the buyers, and that the buyers should accept the partial fulfilment of the orders without recourse. The contract was held to lack consideration so long as it remained executory, since the seller had it in its power to make further contracts or to diminish shipments and thereby create at will a situation which would free it from obligation.

The argument does not seem convincing, since the contingency of making other contracts beyond its power to fulfill, though wholly within the seller's power, could only be brought about by incurring detriment. Though by lowering the price sufficiently doubtless an excessive number of contracts could be obtained, this in itself would involve detriment to the seller, since it would be obliged to deliver coal under such contracts at unwarrantably low prices. Similarly, diminishing shipments would involve loss to the seller.

Conditional Sales

The troublesome question of the rights and remedies of the parties to a conditional sale bids fair to be settled by statute rather than by common law, the rules prevailing at common law being in great confusion, and in the majority of states being founded on no just principle.[88] The Uniform Conditional Sales Act has been passed in Alabama, Arizona, Delaware, New Jersey, South Dakota, Wisconsin, and will doubtless be enacted in other states this season. The statute provides a uniform method of filing contracts of conditional sales in order to validate them against subsequent purchasers and creditors of the buyer, and also makes provision for the protection of both the seller's and the buyer's interest, following the analogy of chattel mortgages. Aside from this statute, many states afford the buyer some protection against the possibility of being wholly deprived of the goods for breach of condition and also forfeiting all payments made.

In a recent Oregon decision,[89] without the aid of statute the court correctly held, contrary to the more commonly prevailing rule at common law — which compels a conditional seller to elect

[88] Williston, Sales, § 579.

[89] First National Bank *v.* Yocom, 96 Ore. 438, 189 Pac. 220 (1920).

either to sue for the price or to reclaim the goods, but denies him the right to do both — that a deficiency judgment might be had after seizure of the goods by the seller and resale of them.[90]

In another recent decision [91] on a disputed point the Minnesota court reached the correct conclusion. The opinion reads:

"There is excellent authority for holding that when the vendor in a conditional sale contract wrongfully takes possession of the property the vendee may treat the contract as rescinded and recover the payments made."[92]

"Cases adopting this doctrine seem to hold that the amount of the payments should be reduced by the value of the use, and in a proper case by a charge for depreciation.[93] In other jurisdictions the wrongful taking is treated as a conversion for which damages appropriate to an action of conversion may be recovered.[94]

"The cases treating the vendee's wrong as a rescission are in some confusion, in part because of the different views obtaining as to the nature of a conditional sale contract, and the measure of damages which they adopt is sometimes difficult of application. Treating the vendor's taking as a wrong for which trover lies is in harmony with our holdings upon the right of a chattel mortgagor to recover in conversion from his mortgagee who has wrongfully retaken the mortgaged property.[95] It affords a definite and adequate remedy. We hold that the vendee, in

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[90] *Id.*, 221. The court said: "The rule followed in this state is in effect that, where one of the remedies provided in a contract for the sale of property containing a reservation of the title in the seller until payment of the purchase price is the right on default of the buyer to seize and sell the property at public or private sale and apply the proceeds toward the payment of the purchase price, and the seller exercises this right, he is entitled to recover from the buyer any balance remaining after so crediting the proceeds of the resale. See also Christie *v.* Scott, 77 Kan. 257, 94 Pac. 214; Van Den Bosch *v.* Bouwman, 138 Mich. 624, 101 N. W. 832, 110 Am. St. Rep. 336; Warner *v.* Zuechel, 19 App. Div. 494, 46 N. Y. Supp. 569; Ascue *v.* C. Aultman & Co., 2 Willson Civ. Cas. Ct. (Tex.) § 497; McPherson *v.* Acme Lbr. Co., 70 Miss. 649, 12 South. 857; Dederick *v.* Wolfe, 68 Miss. 500, 9 South. 350, 24 Am. St. Rep. 283; and note, L. R. A. 1916A, 919."

[91] Reinkey *v.* Findley Electric Co., 180 N. W. (Minn.) 236 (1920).

[92] Bray *v.* Lowery, 163 Cal. 256, 124 Pac. 1004 (1912); Madison, etc. Co. *v.* Osler, 39 Mont. 244, 102 Pac. 325 (1909); Rhodes *v.* Jenkins, 2 Ga. App. 475, 58 S. E. 897 (1907). To these cases may be added Daskalopolis *v.* Mulvanity, 111 Atl. (N. H.) 832 (1920).

[93] Citing Rhodes *v.* Jenkins, 2 Ga. App. 475, 58 S. E. 897 (1907); Bray *v.* Lowery, 163 Cal. 256, 124 Pac. 1004 (1912).

[94] Citing Smith *v.* Goff, 29 R. I. 439, 72 Atl. 289 (1909); Clark *v.* Clement, 75 Vt. 417, 56 Atl. 94 (1903); Goggan *v.* Garner, 119 S. W. (Tex. Civ. App.) 341 (1909).

[95] Citing 1 DUNNELL, MINN. DIG., § 1474 and cases cited.

a situation such as is presented to us, cannot recover the payments made, but must recover, if he seeks damages alone, in conversion."

It may be added in support of this conclusion that a conditional sale is a sale from the time that the goods are delivered to the buyer. It is not a mere contract to sell;[96] and a buyer cannot rescind an executed purchase when the seller retakes the goods wrongfully.

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[96] WILLISTON, SALES, §§ 333 *et seq.*